strument declaring the same to be vacated, duly executed, acknowledged or proved, and recorded in the same office with the plat to be vacated. And in case some of the lots have been sold, the plat may be vacated in the same way by the joinder of all the owners of lots in the execution of such writing. Va. Code, 1904, § 2510a.

This statute applies only to city, town or suburban lots, and the dedication, it would seem, is only of city, town or suburban streets and alleys and not of country highways. No acceptance by the public is required by the statute, but since it is made equivalent to a "deed in fee simple," it would seem that dissent by the authorities would abrogate it. See 7 Va. Law Reg. 476; 5 Va. Law Reg. 477. But quære, if a technical disclaimer would not be necessary. 2 Min. Real Prop., § 1354.

QUIGLEY FURNITURE COMPANY *v.* RHEA, et als.

Richmond, November 21, 1912.

[7 Va. App. 190.]

1. Contracts—Standing Timber—Removal—Extension of Time—Burden of Proof.—Where a contract for the sale of timber provided that the purchaser should have a term of six years for removing, etc., the timber, and under certain specified conditions an additional time, not exceeding one year, would be given: Held, that in a suit to injoin the successor to the rights of the purchaser from wrongful acts and trespasses on the land, and to recover the value of timber cut and removed after the expiration of the period of six years, the burden was on the defendant to show the cause of failure to remove the timber within six years, and upon its failure to establish a right to the additional time provided for in the deed, it has no just cause of complaint that the court held that it had no such right.

2. Idem—Damages—Removal of Timber.—The lowest measure of damages for the wrongful cutting and removal of timber is its value on the land at the time of cutting, or its stumpage value, and where the plaintiff has been held entitled to recover for timber so cut and removed, the defendant cannot complain that damages so measured are excessive.

3. Idem—Measure—Enhanced Value.—It has been held that in actions for damages for the value of timber cut and removed, where the trespass is the result of inadvertence or mistake, and the wrong was not intentional or negligent, the measure of the recovery is the value of the property when first taken—that is, if the conversion sued for was after value had been added and the recovery included the enhanced value, then the defendant should be credited with the value added by him; but that principle has no application where the true owner exercises his right to recapture his property, instead of suing for compensation in damages.

4. Appeal and Error—Estoppel.—Where appellees made no objec-

tion to a decree, the subject of the assignment was not gone into or reported by the commissioner in the lower court, and no exception was taken to his report on that ground, an assignment of cross-error will not be further considered.

Appeal from Circuit Court of Tazewell county. Affirmed.

Greever & Gillespie, for the appellant.
A. S. Higginbotham, for the appellees.

CARDWELL, J.: The bill filed in this cause by appellees (complainants below) sets out that on the 10th day of August, 1899, they or their predecessors in title, together with one Jno. O. Neal, executed to the Chilhowie Lumber Co., a corporation, a deed, whereby they granted and conveyed to said company, upon the terms and under the limitations therein set out, all the timber and trees, except as in the deed reserved and excluded, standing, being and situate upon certain lands in Tazewell county, known as the "Sheffey lands;" that in the deed (filed as "Exhibit A" with the bill) it was provided, among other things, that all trees under fourteen inches in diameter were excluded (except for building roads, tramways, etc.); and that the deed further expressly provided as follows: "that the said second party shall have the term of six years from the date hereof for the purpose of cutting, felling, using, manufacturing and removing the timber hereby conveyed, and the lumber and material manufactured therefrom; * * * provided, further, that if through sickness of any of the managers or operating agents of said second party, or serious accidental cause, the said second party has not, at the expiration of said term of six years, gotten off all of the timber herein conveyed, then an additional time, not exceeding one year will be given to do so."

The bill then recites provisions of the deed usually found in deeds conveying standing timber, the rights of ingress and egress in, over and upon the lands upon which the timber is located; the right to locate and operate machinery, plants, tramroads, etc., necessary for the cutting, manufacturing and marketing of the timber conveyed, and then alleges that at the expiration of the term of six years, the Chilhowie Lumber Company had not cut and removed all the timber sold as aforesaid, but that there remained on the land a large quantity of standing timber above fourteen inches in diameter, and also a large quantity of timber which had been felled by said company; that there was no such sickness of the managers or operating agents of the company, and no such serious accidental cause, as entitled the company to the additional period of one year after the expiration of the six years. The bill further alleges that the Chilhowie Lumber Co., having become involved financially, had all of its business placed

in the hands of B. F. Buchanan, as receiver, who sold to the Quigley Furniture Company, a corporation of the State of New York, such rights as the Chilhowie Lumber Co. had under and by virtue of the timber deed, "Exhibit A."

It appears from the record that a contract of sale to the Quigley Furniture Company was made by B. F. Buchanan, as trustee, on February 15, 1906, and the deed of conveyance executed on March 21, 1906, by which Buchanan, trustee, under and by virtue of a deed of trust and assignment executed to him by the Chilhowie Lumber Co. on August 19, 1904, sold and conveyed to the Quigley Furniture Co. for the consideration of $7,500 all of the right, title and interest of the Chilhowie Lumber Co. in and to the timber then standing and situate on the "Sheffey lands," also all the buildings, structures, etc., of the Chilhowie Lumber Co. then situate on the said lands, and other personal property of the Chilhowie Lumber Co.

It is further charged in the bill in this cause that all of the timber standing or felled which remained on the lands in question after the expiration of six years from the date of the deed ("Exhibit A"), became the property of the complainants, and that neither the Chilhowie Lumber Co. nor the Quigley Furniture Co. had or have any right or title thereto; that upon information and belief the Quigley Furniture Co. had, since the expiration of the said time limit, cut a large quantity of valuable timber upon said lands, and had removed a large quantity of logs therefrom; that the Quigley Furniture Co. had done other acts, operations and trespasses in and upon the lands, which wrongful acts and continuing trespasses done by it, a non-resident corporation, constituted a cloud upon the title and possession of the complainants, for which there was no adequate remedy other than an injunction from a court of equity. Complainants were unable to state in their bill accurately how much timber in quantity and value the Quigley Furniture Co. had wrongfully removed from their said lands, but averred that up to the date of their bill (June 15, 1907) they were entitled to recover from the Quigley Furniture Co. "for removing down timber, and for the use and operation of certain tramroads and rights of way upon the premises at least the sum of fifteen hundred ($1,500.00) dollars."

The bill made the Chilhowie Lumber Co., B. F. Buchanan, receiver (trustee) as aforesaid, and the Quigley Furniture Co. parties defendant thereto, and its prayer was for an attachment to be issued and levied on the property of the Quigley Furniture Co. to secure the amount of its indebtedness to the complainant; that the Quigley Furniture Co. be restrained and enjoined "from further trespassing upon said lands and from cutting or re-

moving any timber or logs therefrom;" and also prayed for an accounting, for a perpetual injunction on final hearing, a recovery of the amount ascertained to be due the complainants, a sale of the attached property, and for general relief.

The Quigley Furniture Co. alone filed an answer to the bill, its answer admitting that at the expiration of the six year limit stipulated in "Exhibit A" with complainant's bill the Chilhowie Lumber Co. had not cut and removed all of the timber sold to it and set out in said deed, but averred that it, the Quigley Furniture Co., assignee of the rights, etc., of the Chilhowie Lumber Co. under the deed, was entitled "to the additional period one year provided for in said deed, because the said Chilhowie Lumber Company suffered great and serious loss by washing out of its tramroad and the burning of its sawmill within said six years, which caused a serious embarrassment in the conduct of its business, and was of such a nature and was sufficient to entitle it to the additional year after the expiration of said six years provided for in said contract." The answer also set up and elaborated other grounds of defence against the relief asked by the complainants, but it is not deemed necessary to set them out here.

The summons and attachment in the case were issued by the clerk, the attachment levied and due return thereof made, depositions were taken and filed by both parties, and the circuit court by, its decree of June 22, 1908, settled the principles of the cause and adjudicated as follows:

"1. That the Quigley Furniture Company was only entitled to six years from the 10th day of August, 1899, (the date of the timber deed) to cut and remove the timber, and was not entitled to the one year extension provided for in the deed.

2. That all timber mentioned in the timber deed which had not been severed at the expiration of the six year limit, reverted to and became the property of the complainants; and that all of the timber which had been severed within the said six years, but which had not been removed from the premises, was the property of the defendant company, and that the complainants had no title to the timber severed within the said period of six years.

3. That the complainants permit the removal by the defendant company of all logs on the premises cut prior to the 10th day of August, 1905 (the expiration of the six year limit), and that the defendant pay to the complainants all actual damages, to be ascertained in this cause, which may be done to the premises by reason of ingress and egress in removing such logs.

4. That as timber cut by defendant company after the expiration of the six years, and manufactured or removed from the premises, whether over or under fourteen inches in diameter,

the defendant company is liable to the complainants for the value thereof, and for any damages sustained by such cutting and removal, and as to any timber cut since the 10th day of August, 1905, but not removed or manufactured, the removal of the logs thus cut is enjoined.

5. That the defendant company is also liable for the use of and damage to complainants' lands since August 10, 1905.

6. That the cause is referred to a commissioner to take an account and report the amount of the liability of the Quigley Furniture Company to the complainants, upon the basis of liability fixed by the terms of this decree."

The commissioner filed his report, together with the evidence taken before him, with respect to the accounting ordered, on November 30, 1910, the delay in filing being explained as due to negotiations between the parties looking to a settlement of the matters in controversy. He found and reported $2.25 per thousand as the value of 750,000 feet of timber cut and removed by the Quigley Furniture Co. after the six year limit, which he ascertained to be the value of the timber at the time of severance, and reported that it did not appear "that the land was damaged other than by the loss of the timber."

Exceptions to the commissioner's report were filed by both of the parties to the controversy, but were, except in some minor particulars, overruled by the court, and by its final decree the report, finding $2.25 per thousand as the value of 750,000 feet of timber cut and removed from the complainants' lands after August 10, 1905, was confirmed, and a recovery accordingly in favor of the complainants against the Quigley Furniture Co. was decreed; and as to 250,000 feet of timber cut after August 10, 1905, but not removed from the lands (which the court by its decree of June, 1908, had adjudicated belonged to the complainants and enjoined the defendants from removing) the court ruled that the complainants were entitled to nothing on account of the cutting of these logs (the 250,000 feet) for the reason that they had "elected, as to this timber, to claim and take possession of the same on the lands before removal by the defendant;" and a perpetual injunction was also decreed in accordance with the prayer of complainants' bill. From this final decree, entered by the circuit court at its December term, 1910, the Quigley Furniture Company obtained this appeal.

The errors of the circuit court alleged in the petition for the appeal are: (1) In holding that the appellant was not entitled to have the additional year it claimed within which to cut and remove timber from the "Sheffey lands;" (2) In decreeing $2.25 per thousand as the value of 750,000 feet of timber removed after the time limit, which value is claimed to be excessive; and (3) in not allowing appellant to recover, or have credited

on the recovery decreed against it, the amount paid out and expended by it in cutting and skidding the 250,000 feet of timber not removed from the lands and reclaimed by appellees."

In considering the first assignment of error it is to be observed that the provision in the contract of sale of the timber on the "Sheffey lands" for additional time, after reciting the causes for which it might be asked, is, "then an additional time, not exceeding one year, will be given to do so." The bill in the cause alleged that there was no such "sickness of the managers or operating agents" of the Chilhowie Lumber Co., and no such "serious accidental cause," as entitled the company to the additional period of one year after the expiration of the six years stipulated for in the deed as the time limit within which the timber was to be cut and removed from the "Sheffey lands;" and the bill was taken for confessed as to all the defendants except appellant, whose answer only bases its right to the additional year provided for in the deed on the ground that the Chilhowie Lumber Co. suffered great and serious loss by the washing out its tramroad and the burning of its sawmill, which caused serious embarrassment in the conduct of its business. It appears in the record that the accidental causes relied on occurred in the year 1901, while the deed of assignment from the Chilhowie Lumber Co. to Buchanan, trustee, was executed August 19, 1904, the trustee taking charge of the company's affairs after that date; yet none of the agents and representatives of the predecessors in title of the appellant are called as witnesses to disclose whether the failure to get off all the timber within the time limit of six years was due to the wash-out and fires of 1901 or some other cause. Whatever proof there was to be had as to the cause of not getting the timber off within the time limit was peculiarly within the knowledge of appellant, and it adduced none other than that obtained from two farmer witnesses living near the "Sheffey lands," and acquainted in a general way with the operations of the Chilhowie Lumber Co. on those lands. While these witnesses testify as to the wash-out and fires of 1901, they were unable to say whether or not those occurrences were the cause of the timber not being gotten off the "Sheffey lands" within six years from the Chilhowie Lumber Company's purchase of it. The burden was upon the appellant to show the cause, but instead of doing so it appears that it all along assumed the right to the additional year's time, and that, too, without ever having applied to appellees for an extension of the time limit.

Appellant is to be held as having notice of all the provisions of the deed from appellees to the Chilhowie Lumber Co., under which it claimed and which expressly provided that an additional time, not exceeding one year, within which to cut and

remove the timber, would be allowed only on certain conditions. It chose to ignore the terms of the deed under which it claimed, and to act on its own unwarranted assumption of the right to the one year's additional time provided for in the deed, and, therefore, it has no just cause of complaint that the court held that it had no such right.

The second assignment of error is also without merit. The proof taken by the master commissioner and returned with his report very clearly sustains his finding, approved by the court, of $2.25 per thousand as the value of 750,000 feet of timber cut and removed by appellant from the "Sheffey lands" after the time limit. Practically the only ground relied on by appellant for its contention that $2.25 per thousand for the 750,000 feet of timber cut and removed after the time limit is excessive, is that the company had made no money on the timber manufactured from the "Sheffey lands" or other lands in that section, and therefore, if the company be required to pay for the 750,000 feet of timber it should be credited with the cost of cutting and skidding this timber, amounting to $2,812.50. If this contention were sustained, the value of the timber to appellees, as fixed by the commissioner's report, viz., $1,687.50, would be more than wiped out.

The bill in the cause averred that the complainants (appellees), up to the filing of their bill, were entitled to recover from the defendant company (appellant) for removing the down timber, etc.—that is, the 750,000 feet cut and removed after the six years limit; and as to the timber cut into logs after the time limit, but not removed from the land, they were entitled to the same as if it were their property; and asked for an injunction against "removing any timber or logs" from the lands. The measure of damages applied to the 750,000 feet of timber by the commissioner and approved by the court was its value on the land at the time of cutting, or its stumpage value; and as to the 250,000 feet of timber, the appellees recaptured the same on the land before removal and recovered no damage whatever for its severance from the land. The measure of damages applied to the timber cut and removed was the lowest and most favorable measure of damages known to the rules of law applicable to such cases, and appellant has no just ground to complain of it.

In support of appellant's third and last assignment of error, the following contention is made in the petition for this appeal: "If the court should hold that the petitioner was not entitled to the additional year, as it is most earnestly contended it was, still, as petitioner in good faith greatly increased the value of the 250,000 feet which it was prevented from moving by the election of complainants to retain same in the then improved condition rather than recover from petitioner the value of the

timber standing, they must pay to petitioner the amount of increased value, which is shown to be not less than $937.00."

The ruling of the lower court that appellant was, under the terms of the contract "Exhibit A" with the bill, only entitled to six years from the date of the contract (August 10, 1899) to cut and remove the timber, is in line with the weight of authority and approved by this court in construing a similar contract, though less stringent in its requirements that the timber be cut and removed within the time limit, in Wright *v.* Camp Mfg. Co., 110 Va., 698, 3 Va. App. 899, where the following principles of law are approved and unheld: "Whenever in an instrument conveying standing timber there is a clause, either prescribing or granting a certain time in which the vendee should or might cut or remove timber, the grantee has no title whatever to any timber not cut or removed at the expiration of said period."

"In the case of sale of standing timber, or of an exception of the timber on a conveyance of the land, the timber must be cut and removed within the time limited in the written instrument, and all that is not so cut and removed adheres to the land, free from the sale or exception, as the legal effect of such contract of sale or exception of timber is a right to only so much timber as shall be cut and taken off within the limited time."

Upon looking to the whole deed and all of its provisions, which had to be considered to arrive at its proper construction, the court held in that case that it was not the intention of the parties to give an absolute and unconditional title to the timber, but to only such as was cut and removed within the time limited by the deed and such extensions thereof as the grantee was entitled to demand upon a fair construction of the deed, or as might be agreed upon between the parties.

The authorities also amply sustain the ruling of the trial court in this cause, that the title of appellees to the 250,000 feet of timber cut into logs and lying upon the "Sheffey lands" at the time of the institution of this suit, was not devested by the acts of appellant in cutting the timber and skidding a part of it, but that the title remained in them and they had the right to reclaim the property, as they did, without rendering themselves liable to appellant for any expenditure made in cutting and skidding the logs.

There are a number of cases, some of them cited for appellant, which hold that in actions for damages for the value of timber cut and removed, where the trespass is the result of inadvertence or mistake, and the wrong was not intentional or negligent, the measure of the recovery is the value of the property when first taken—that is, if the conversion sued for was after value

had been added and the recovery included the enhanced value, then the defendant should be credited with the value added by him; but that principle has no sort of application to the facts of this case. In other words, there is a marked distinction made in the decided cases where the true owner exercises his right to recapture his property and those cases where he waives that right and elects to sue for compensation in damages.

In Gaskins *v.* Davis, 115 N. C., 85, the facts appearing and the contentions made were practically identical with the case at bar. There a part of the timber having been recaptured and a part having been removed and the value thereof recovered, the defendant contended that he should recoup for the money expended on the recaptured property, but his claim was denied. To a report of that case in 44 Am. St. Rep., 439-444, Mr. Freeman has a lengthy note, citing numerous cases and discussing the law as to recapture of "Property Taken Innocently," from which we quote as follows: "The owner of timber so cut has the right to reclaim the logs or the timber if he can, and if he does, the trespasser, though cutting the timber in good faith, has no claim upon the owner, either in a legal or equitable sense, and there is no injustice in holding that such trespasser must lose his labor and expense expended in cutting the timber of another into logs or lumber. Gates *v.* Rife Boom Co., 70 Mich., 309; Busch *v.* Fisher, 89 Mich., 192. One cannot convert to his own use the material of another, and by changing its form acquire title thereto on the ground that he is liable for its value. He can acquire no title by a wrongful act unless the owner deems it proper to abandon his property and accept satisfaction in value, and, whatever alteration or form his property has undergone, the owner may seize it in its new shape, if he can prove the identity of the original materials. Dunn *v.* O'Neal, 1 Snead 106; 60 Am. Dec. 140."

In Busch *v.* Fisher, cited by Mr. Freeman in his note, supra, the opinion says: "A trespasser, however innocent, acquires no property in logs cut on the lands of another, nor lien thereon for the value of the labor and expense of cutting, nor can he recover such value in an action of trover or assumpsit from the owner of the timber, who has the right to reclaim the logs."

Again, the learned author in his note quotes from the opinion of the Supreme Court of Kentucky in Strubbee *v.* Trustees Cin. Ry., 78 Ky., 481, wherein it was held, that the owner of timber cut from his land by an innocent trespasser cannot be devested of his title, although the trespasser has converted it into railroad ties, and says: "The better rule is that the fact that the property has been increased in value is not sufficient to divest the owner of title, nor is the party performing the

labor, though mistaken as to his rights entitled to compensation to the extent of the benefit received by the owner."

In Weymouth *v.* Chicago &c. Ry. Co., 17 Wis. 550, 84 Am. Dec. 763, a case also in point, the opinion says: "In determining the question of recapture, the law must either allow the owner to retake the property, or it must hold that he has lost his right by the wrongful act of another. If retaken at all, it must be taken as it is found, though enhanced in value by the trespasser. It cannot be restored to its original condition. The law, therefore, being obliged to say that either the wrongdoer shall lose his labor, or the owner lose the right to take his property wherever he may find it, very properly decides in favor of the latter."

The court below, in its decree of June 22, 1908, settling the principles of this cause, adjudicated, with respect to the timber which had been cut, but not removed prior to August 10, 1905—that is, within the six years limit—that such timber was the property of the defendant company (appellant), and that complainants (appellees) had no title thereto; "that as complainants are invoking the aid of a court of equity, it will, as a condition of granting the relief herein granted, require complainants to permit the removal by the defendant company of all logs, if any, cut prior to August 10, 1905, paying to the complainants actual damages which may be done to the premises by reason of ingress and egress in removing such logs, such damages to be ascertained in this cause."

This ruling of the lower court is assigned as cross-error by appellees, under Rule VIII of this court, and with respect thereto we deem it only necessary to say that appellees made no objection, so far as the record discloses, to the decree entered in the cause June 22, 1905; that no injury was gone into or reported by the commissioner concerning logs cut, but not removed within the six years, and no exception was taken to the report on that ground; and, moreover, if there were any such logs, they were doubtless of little or no value, for appellees invoke the record here as showing that the logs cut after the time limit and not removed but reclaimed by appellees, proved to be practically worthless to them.

Upon the whole case we are of opinion that the decree appealed from is right, and it is, therefore, affirmed. Affirmed.

Right of Recaption.

It is definitely decided in the principal case that if a party upon whom a trespass has been committed, whereby his property is taken or carried away, elects to exercise his right to recapture his property instead of suing for compensation in damages, then in such case the defendant is not entitled to be credited with the value added by him

to the property, but the trespasser must lose his labor and expense expended by him. The cases in which this rule has most usually been applied are those in which timber has been wrongfully removed from the plaintiff's land, as in the principal case, and labor expended thereon, as by converting the logs into cross ties, etc. See Larkins *v.* Davis, 115 N. C. 85, 44 Am. St. Rep. 439; Busch *v.* Fisher, 89 Mich. 192; Strubbee *v.* Trustees Cin. Ry., 78 Ky. 481.

Change of Species or Added Value as Conferring Title as against Owner.—While the weight of authority as to the right of the true owner to recapture property innocently taken, although its species has been changed and its value greatly enhanced by the labor of the trespasses, is in accordance with the holding in the principal case above reported, yet the contrary view is not without support. Thus, in Baker *v.* Meisch, 29 Neb. 227, it is held that "where the appropriation of the property of another is by mistake of fact, or accidental, and labor has in good faith been expended upon it, which converts it into something entirely different, and very greatly increases its value, the original article being comparatively of but little value, the title to the property is held to pass to the person by whose labor the change has been wrought, and the original owner may recover the value of the article as it was before the conversion."

In Wetherbee *v.* Green, 22 Mich. 311, Judge Cooley laid down the rule that "no test which satisfies the reason of the law can be applied to the adjustment of questions of title to chattels by accession unless it keeps in view the circumstances of relative values," and held that where timber of the value of twenty-five dollars had been, in the exercise of what was supposed to be proper authority, converted into hoops of the value of seven hundred dollars, the title to the property, in its converted form, passed to the party by whose labor, in good faith, the change had been wrought, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass. This case is approved in Railway Co. *v.* Hutchins, 32 Ohio 571.

Right of Owner as against Innocent Purchaser from Trespasser.—With regard to the right of the true owner of property as against an innocent purchaser of such property from a trespasser, the decisions are at variance. Thus, in the case of Railway Co. *v.* Hutchins, 32 Ohio St. 571, timber was cut from the lands of B. by trespassers, who, by their labor, converted it into cordwood and railroad ties, thus increasing its value three fold. It was then sold to an innocent purchaser, who was sued by B. for the value of the wood and ties. It was held that while, if the owner had found his wood in the hands of the trespassers, it might have been retaken, or its value as cordwood recovered, upon the principle "in odium spoliatoris," this principle could not apply where an innocent purchaser comes into the case, and the owner could not, as against such innocent purchaser, recapture the timber, or recover its value as enhanced by the labor of the wrongdoers after t was severed from the realty, but only its value as timber.

This view, however, would seem to be in conflict with the weight of authority, which is to the effect that the transfer to an innocent purchaser of property taken by a trespasser, and enhanced in value by his labor will not preclude the owner from recapturing his property if it can be identified, or, if he so elect, to recover the improved value of the property. Thus, in Strubbee *v.* Trustees, etc., 78 Ky. 481, 39 Am. Rep. 251, it was held that the owner of trees cut on his land by a trespasser and converted into railroad ties, may recover them from an innocent purchaser from the trespasser.

In the decision of this case in the court below, the doctrine of

Railway Co. *v.* Hutchins, supra, seems to have controlled, and the appellate court, noting this fact, held that "that case has gone further in denying the right of recovery to the owner of his property, or its value, than any case to which our attention has been called."

The court, in Strubbee *v.* Trustees, etc., supra, in reversing the decision of the court below, and disapproving the doctrine there relied on, said: "If the wanton trespasser is permitted to dispose of the property in a case like this to an innocent purchaser, for three times the value of the timber in the tree, it is ample remuneration to the wrongdoer for his labor, and the real owner is deprived of his property without his knowledge or consent. The prospective value of the timber to the owner is denied him. His wishes are not consulted as to the character and kind of timber to be taken from his woodland. He may desire it to remain in its primitive state, or as an ornament to his home, still he is told that the timber, as improved by the trespasser, enables the latter by a sale to an innocent purchaser to pass the title. Such trespasses are committed ordinarily by irresponsible parties, and when so well remunerated a second trespass will be committed with a view to similar results. It is not pretended that any labor was bestowed by the appellee (the purchaser) on this timber, or any money expended in changing its character or condition; and if such had been the case, it could not, upon the facts before us as to the change made in the property, have affected the owner's right of recovery. In this case, if the company had been the original trespasser, under a mistake as to its right to the timber, the appellant (the owner) would have been entitled to recover, and when the original taking was a willful trespass, the bona fide purchaser acquired no greater right than the party under whom he claims could have asserted. The case of Heard *v.* James, 49 Miss. 236, relied on by the appellee, gave to the original owner the value of the timber in its improved condition. There the trees were severed and the timber converted into staves by a trespasser, and the latter was held responsible for their value. That case intimates that where the value of the thing has been enhanced by the labor and skill employed to adapt the material to a more useful purpose, under a mistake as to the right of ownership, the real owner will be confined to the value of the original article; but it is nowhere adjudged, except in the case reported in 32 Ohio, that the innocent purchaser can acquire title to the thing itself, or its increased value, because of the labor performed by the wrongdoer under whom he claims. While in an action of trover the value at the time of the conversion is ordinarily the criterion of damages, when the conversion has been innocently made, yet when the owner brings his action to recover his property (the thing itself), it is no answer to the action to say that when the property was taken, the defendant in good faith believed it was his, and as he has improved its condition so as to double or treble its value, the right of recovery is gone."

In Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307, approved in Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 491, it was held that "if the wrongdoer sell the chattel to an honest purchaser, having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership."

S. B. F.